United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1290

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P/S

To be argued by
ROBERT J. COSTELLO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1290

UNITED STATES OF AMERICA,
Appellee,

—v—

RUSSEL KELNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1290

UNITED STATES OF AMERICA,

Appellee,

—v.—

RUSSEL KELNER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Russel Kelner appeals from a judgment of conviction entered on July 9, 1975, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 75 Cr. 200, filed February 27, 1975, charged Kelner in one count with transmitting in interstate commerce a communication containing a threat to assassinate Yasir Arafat. Title 18, United States Code, Sections 875(c) and 2.

The trial commenced on June 10, 1975 and concluded on June 13, 1975, when the jury returned a guilty verdict.

On July 9, 1975 Judge Owen sentenced Kelner to imprisonment for one year, execution suspended, probation for four years and a $1,000 committed fine.

Statement of Facts

The Government's Case

The proof at trial established that at 5:30 p.m. on November 11, 1974, the United Press International ("U.P.I.") received a call from the Jewish Defense League ("JDL") notifying them of a news conference to be held later that evening at the JDL Headquarters (Tr. 244).* At 6:00 p.m., U.P.I. Greater New York Wire, a news service which is received by most area radio and television stations and some newspapers, sent out an "advisory" notifying its customers:

> "JEWISH DEFENSE LEAGUE HOLDS NEWS CONFERENCE TO ALLEGE THREATS HAVE BEEN MADE AGAINST JDL BY PALESTINE LIBERATION ORGANIZATION, 1133 BROADWAY AT 26TH STREET, ROOM 1026, 8 P.M." (Tr. 55, 62; GX 2).

This "advisory" was received by WPIX Television, which broadcasts on Channel 11 in New York. WPIX is a television station licensed by the Federal Communications Commission, with a broadcast range of 50 miles extending into counties in New York, Connecticut and New Jersey (Tr. 30-31).

At the time that U.P.I. sent out the "advisory", WPIX reporter John Miller was covering a JDL demonstration in front of the Waldorf-Astoria Hotel in Manhattan (Tr. 70-72). The demonstration was directed against the

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* "Tr." refers to the trial transcript which is reproduced in the Appendix. "GX" refers to Government exhibit. References to "A." are to other portions of the Appendix. The sentencing minutes (Tr. 439-471) of July 9, 1975 are not, however, reproduced in the Appendix.

presence in New York of a delegation of members of the Palestine Liberation Organization* ("PLO") (Tr. 74).

After returning to WPIX, Miller received a copy of the U.P.I. "advisory" (GX 2) from his assignment editor and was instructed to cover the JDL press conference (Tr. 75). Miller and his three-man film crew arrived at 1133 Broadway at approximately 8:00 p.m. (Tr. 79). They entered the building and took an elevator up to the floor where the press conference was being held. There the WPIX crew was directed by two or three JDL members dressed in army fatigues to a small room occupied by reporters from various radio stations and the New York Daily News (Tr. 76-79).

Within a few moments, a door was opened into a larger room. The reporters and photographers went in and began asking questions of the defendant Kelner, who was seated behind a desk conducting the press conference. In back of Kelner and to his right was another man dressed in military fatigues (Tr. 80). Kelner had placed a .38 Caliber Police Special revolver on the desk in front of him (Tr. 279).

The WPIX crew was the last to enter the room and immediately began to set up its equipment. When Miller and the WPIX crew entered the larger room Kelner was already speaking to the other reporters. While the WPIX

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* Yasir Arafat, leader of the PLO, had been invited to New York to address the United Nations General Assembly. The announcement of this invitation and the expected presence in New York of Arafat evoked very strong feelings from many New Yorkers who disapproved of him and the atrocities allegedly committed by members of his organization. There was, however, no proof at trial that Arafat himself had in fact yet arrived at the Waldorf-Astoria Hotel or even in the United States on the evening of the JDL press conference (Tr. 137, 153, 154).

crew set up its equipment, Miller paid little attention to what was being said (Tr. 84-85). He did, however, hear one of the other reporters ask Kelner whether he was talking about an assassination plot, and Kelner responded that he was (Tr. 85, 104).

Immediately after the WPIX crew was set up, they began filming general shots of the press conference without sound for use as a "lead in" * (Tr. 98). The WPIX crew then began filming the actual interview of Kelner by Miller. The camera man was located approximately six feet directly in front of Kelner (Tr. 86). The light man was shining a very bright television light on Kelner. Miller, the reporter, stood approximately two feet in front of Kelner with a microphone in his hand with the number "11" in large numerals on the microphone (Tr. 86-87). In short, there was no doubt that Kelner was aware of the television crew. The interview began without any prompting by Miller, who simply instructed Kelner to "Go ahead" (Tr. 101).

The following exchange then took place (GX 1 **).

Kelner: We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.

Miller: How do you plan to do that? You're going to kill him?

Kelner: I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist, but should exist.

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* A "lead in" is silent film of the area which allows the television anchorman to introduce the news subject to the viewing audience.

** Government's Exhibit 1, the film that was broadcast on WPIX Channel 11 on November 11, 1974 is available for the Court's examination.

Miller: Are you saying that you plan to kill them?

Kelner: We are planning to assassinate Mr. Arafat. Just as if any other mur— just the way any other murderer is treated.

Miller: Do you have the people picked out for this? Have you planned it out? Have you started this operation?

Kelner: Everything is planned in detail.

Miller: Do you think it will come off?

Kelner: It's going to come off.

Miller: Can you elaborate on where or when or how you plan to take care of this?

Kelner: If I elaborate it might be a problem in bringing it off.

Following the interview with Kelner, Miller and the WPIX film crew took the film of the Kelner interview with them to Queens where they went to cover another story. From Queens, the film was sent back to the WPIX studios at 220 East 42nd Street, New York, New York (Tr. 88). After Miller returned to the WPIX studios he edited the film (Tr. 89). The Kelner interview was broadcast on the 10 o'clock WPIX Channel 11 news that evening (Tr. 50-51, 142-143, 145, 156). The exchange set forth above between Kelner and Miller appeared on television in its entirety (Tr. 98, 106).

The Defendant's Case

Kelner's case consisted of his own testimony which followed that of four character witnesses.

1. Character Witnesses

John O'Connell testified that he had known Kelner for approximately five years as a peaceful and honest man (Tr. 188-191). On cross-examination O'Connell stated that he was not aware of several of Kelner's arrests (Tr. 194, 196, 197, 198).

Asked whether he knew Kelner's reputation "regarding his veracity, honesty, peacefulness", Rabbi Arnold Wolf testified that he knew Kelner as a very sensitive individual, trustworthy, reliable, truthful and peaceful (Tr. 209-210).

Adelaide Gwertzman testified that in her position as office manager of her husband's law firm, she had been responsible for once hiring Kelner. Asked for her knowledge of Kelner's reputation for peacefulness, veracity and honesty, she testified that Kelner was very dependable and "is a man of great integrity" (Tr. 215).

Both Rabbi Wolf and Mrs. Gwertzman testified on direct examination that the fact that Kelner had been arrested a number of times would not change their mind about his reputation (Tr. 211-212, 216). Neither witness was cross-examined concerning their knowledge of specific arrests of Kelner.

The final character witness, Arthur Miller, an attorney testified that he had known Kelner for three years. Kelner, Miller testified, has a wonderful reputation for honesty, devotion, dedication and "[Kelner's] reputation for peacefulness is again one of his highest characters" (Tr. 219-220, 222). Furthermore, Arthur Miller stated that the fact that Kelner had been arrested on several occasions would not alter his opinion of Kelner as a peaceful individual (Tr. 222-223). Miller stated he himself had

represented Kelner on several occasions, and that as a friend and fellow member of the JDL, Miller did not regard as criminal certain actions for which Kelner had been arrested. Miller went on to explain on cross-examination that he did not believe that an assault on a foreign official with whom one disagrees strongly is a crime (Tr. 229-230).

2. Kelner's Testimony

Kelner testified that as office manager of the JDL he helped prepare public relations materials and press releases (Tr. 234).

Kelner maintained that the purpose of the November 11, 1974 press conference was to respond to telephone threats that the JDL had received from members of the PLO (Tr. 244). He remembered that calls were made to invite the media to the press conference but was unable to say whether he himself had made any of those calls (Tr. 244).

Kelner maintained that the statement he made to John Miller of WPIX television "sounded like a threat, but it was not a threat" (Tr. 247). Kelner described his statements to Miller at the press conference as "from the heart" and not exaggerated (Tr. 254). He also admitted that his words sounded like a threat (Tr. 247, 260, 286-287) and that his statement was not a joke (Tr. 281-282). Kelner noted that with the existing security precautions in fact "it was impossible to reach Mr. Arafat" (Tr. 247). Kelner stated that at the time he made the statements neither he nor the JDL had any plans "to carry out an assassination because we knew it would be impossible. It would be futile" (Tr. 248).

Kelner testified that after the press conference started he began to realize the type of story that the reporters

were looking for and that he gave them what he thought they wanted.*

Kelner testified that while he admitted that the words he spoke at the press conference were the words of a threat, he had no intention of following up on those words (Tr. 260). Kelner stated that he had used the gun on the table and the men in army fatigue-type uniforms to create the right "appearance" (Tr. 261). Kelner knew that the press and the media had been contacted and that a press conference had been scheduled (Tr. 273). Indeed, the JDL had sought television coverage for the news conference (Tr. 289) and when Kelner spoke the words that he admitted sounded like a threat, he wanted his statements to appear on television (Tr. 290) and he wanted the television audience to believe that he meant what he said during the interview shown on WPIX (Tr. 282-283).

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* "I then began to realize what they were looking for and that is the film that we saw here today" (Tr. 254).

ARGUMENT

POINT I

The evidence established that Kelner wilfully caused the transmission of his threatening communication in interstate commerce.

A. The WPIX broadcast was a transmission of a communication in Interstate Commerce within the meaning of 18 U.S.C. § 875(c).

The District Court properly concluded that a telecast over a commercial television station in New York with a broadcast range into other states was a transmission of a threatening communication in interstate commerce within the meaning of the statute. The fact that the filmed Kelner interview (GX 1) was telecast on WPIX's 10:00 p.m. news program was not disputed by the defense and was fully established at trial (Tr. 50-51, 142-143, 145, 156), as were the facts that WPIX's broadcast range extended into certain counties of Connecticut and New Jersey and that WPIX was licensed by the Federal Communication Commission (Tr. 30-31). Kelner's suggestion on appeal that 18 U.S.C. § 875(c) does not apply to television broadcasting (Brief at 28) flies in the face of a plain reading of Section 875(c), which refers to "*any* communication".*

The statute as originally drafted prohibited the transmission "in interstate commerce by telephone, telegraph

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* 18 U.S.C. § 875(c) reads in pertinent part as follows:

"(c) Whoever transmits *in interstate commerce any communication* containing any threat to . . . injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

radio or oral message or by any other means whatsoever any threat. . . ." Prior to its enactment, the House Committee deleted the references to specific forms of communication, so that the statute as enacted prohibited the transmission of threats in interstate commerce "by any means whatsoever." H.R. Rep. No. 1456, 73rd Cong., 2d Sess. (1934). However, the 1934 statute applied only to threats of an extortionate nature and therefore in 1939, at the request of the Department of Justice, the statute was amended to include threats that were not extortionate in nature. H.R. Rep. No. 102, 76th Cong., 1st Sess. (1939). The 1939 amendments, maintained the "by any means whatsoever" language but applied it to "any communication containing any threat. . ." Act of May 15, 1939, Ch. 133, § 2, 53 Stat. 740, 742.

Congressional concern in 1939 focused on the nature and circumstances of the threats rather than the method of transmission. By its amendments,* Congress was clearly broadening the statute as to the types of threats that would be covered. There was no need to broaden the method of transmission since "any communication in interstate commerce" meant just that.

Kelner's argument that the manner in which the threats were transmitted—by television broadcast—took Kelner's conduct outside the scope of the statute is without merit. The statute from its beginnings, as the legislative history makes clear, was intended to cover threatening communications that were broadcast, a mode of transmission which clearly contemplated receipt of such communication by a broad group of individuals among the public at large. Contrary to Kelner's argument,

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* In 1948, the statute was amended again to delete by now redundant phrase "by any means whatsoever." H.R. Rep. No. 304, 80th Cong., 2d Sess. (1948).

there is nothing in the statute which suggests that whether a "communication" has been "transmitted" depends on the existence or particular identity of a recipient; indeed, the statute does not require that the communication be received, only that it be transmitted. The suggestion made by Kelner that the statute should apply only to threats communicated to the person threatened or to "a specific addressee who, in the mind of the defendant, was in a position either to act upon the threat or to communicate it to someone who could act upon it or be placed in fear" (Brief at 28) is without support and ignores both that the broadcast here was clearly designed to create apprehension among a large group of individuals, whether PLO sympathizers or others, and that conduct tending to generate alarm in the public at large was, if anything, more appropriately within the statutory prohibition than conduct of a more limited variety. Moreover, Kelner's argument necessarily assumes, erroneously on any construction of this statute, that the breadth of the transmission of his threats somehow precluded them from being "communications" to those who by his own argument the statute was intended to protect here, e.g., PLO members and their sympathizers. In any event, the fact that the defendant sought to intimidate and disrupt the activities of a group of individuals by using a means of transmission which reached a group broader than that should plainly not immunize conduct which even Kelner would concede to be forbidden had he acted more discreetly.

Kelner next argues that there was no communication in interstate commerce since Kelner alleges that both he and Arafat were in New York. This contention is clearly erroneous. Section 875 requires that the communication travel in interstate commerce, not that the sender and the "target" of the threat be in different states. What is required is that the communication

travel from one state to another. Since the "target" of the threat does not have to receive the communication, *United States* v. *Holder*, 302 F. Supp. 296, 301 (D. Mont. 1969) (Jameson, D.J.), *aff'd*, 427 F.2d 715 (9th Cir. 1970),* his location is irrelevent.** The testimony at trial was clear that the WPIX broadcast traveled into counties of Connecticut and New Jersey (Tr. 32). This was sufficient to satisfy the statute.

B. Kelner "Wilfully Caused" the transmission over WPIX Channel 11 of his threat within the meaning of 18 U.S.C. § 2(b).

Kelner further contends that inasmuch as the decision to include the film of the Kelner interview on its evening news was made by WPIX itself, Kelner cannot be said to have "wilfully caused" the transmission within the meaning of 18 U.S.C. § 2(b).*** Kelner contends that Judge Owen "misunderstood 18 U.S.C. § 2 in the instructions he gave the jury" (Brief at 21). Kelner can not be heard to object to the Judge's charge now, since no exception was taken in the Court below. See Rule 30, Fed. R. Crim. P.; *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

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* In *United States* v. *Levison*, 418 F.2d 624 (9th Cir. 1969) and *Seeber* v. *United States*, 329 F.2d 572 (9th Cir. 1964) this point seems to have been assumed by the parties and the Court. In both of these cases, the intended victims did not receive the threatening communication.

** There was no proof at trial that Arafat was in fact in New York (Tr. 137, 153, 154).

*** The statute reads as follows:

> "(b) Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In any event, the District Court's charge was free from error. Judge Owen, following virtually verbatim the definition of "wilfully caused" in *United States* v. *Scandifia*, 390 F.2d 244, 249-250 (2d Cir. 1968), vacated on other grounds sub. nom. *Giordano* v. *United States*, 394 U.S. 310 (1969), defined the term "wilfully caused" as follows:

> "the term 'wilfully caused' means did the defendant take some action without which the communication in interstate commerce would not have occurred. And—I underscore the 'and'—did the defendant intend, know, or could he reasonably have foreseen—did he intend, know or have reasonably foreseen—that his statement would be transmitted in interstate commerce by others" (Tr. 416).

The charge was clearly correct and the jury's finding that Kelner had "wilfully caused" the transmission within the meaning of the statute was fully supported by the evidence.

The JDL had called the press conference (Tr. 244), and Kelner wanted television coverage of that press conference (Tr. 289). When Kelner stated, "We are planning to assassinate Mr. Arafat" (GX 1) he was aware that he was talking into a television microphone and film camera, and he wanted those words to be broadcast (Tr. 86-87, 290). Nothing more is needed. Kelner can not be insulated from criminal responsibility merely because the actual broadcast was accomplished, as he fully intended, through an innocent intermediary, WPIX. *Pereira* v. *United States*, 347 U.S. 1, 8 (1953); *United States* v. *Bryan*, 483 F.2d 88, 92 (3d Cir. 1973) (en banc); *United States* v. *Kelley*, 395 F.2d 727, 729 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968); *United States* v. *Scandifia*, *supra*, 390 F.2d at 249; *see United States* v. *Masters*, 456 F.2d 1060 (9th Cir. 1972).

This is not the case of a man whose utterances are unexpectedly broadcast on television. The JDL called the press conference, Kelner knew about it at least two hours in advance. His statement was not an excited utterance, but a cool, calm statement of a threat.* The broadcast of Kelner's threatening remarks was the fully anticipated, intended and natural consequence of calling the press conference and making the statements to a television film crew.**

POINT II

The issue of whether Kelner's statements constituted a threat to injure as opposed to mere "political hyperbole" was properly submitted to the jury.

Kelner contends that his statements made at the press conference constituted nothing more than political hyperbole and as such were protected under the First Amendment. As observed, however, by Judge Owen at the time of Kelner's sentencing: "A statement of outrage and protest clothed in a threat to kill is not constitution-

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* There was testimony that Kelner appeared quite calm during this statement (Tr. 130). Moreover this was at least the second time during the press conference that Kelner had discussed plans to assassinate Mr. Arafat (Tr. 85, 104). In addition, Kelner was aware of the general unlawful nature of making threatening communications, having previously reported to the New York City police department alleged telephone threats made against JDL members by representatives of the PLO (Tr. 295-297).

** As stated in *Kolod* v. *United States*, 371 F.2d 983 (10th Cir. 1967), vacated on other grounds, 390 U.S. 136 (1968), a case interpreting 18 U.S.C. § 875(c):

> "Where federal criminal jurisdiction is based upon the presence of an interstate transaction or occurrence, it is necessary only that the evidence provide an inference that the defendant could have reasonably anticipated the interstate ramifications of his wrongful conduct or the wrongful conduct of those with whom he was associated." *Id.* at 993.

ally protected free speech" (Tr. 468). *Watts* v. *United States*, 394 U.S. 705 (1969). The notion that threats to inflict bodily harm on another are constitutionally protected free speech has been consistently rejected in the plethora of decisions sustaining convictions under 18 U.S.C. § 871 (threats against the President and Vice-President), see, e.g., *Watts* v. *United States*, *supra*, 18 U.S.C. § 875(c) (the instant statute), see, e.g., *United States* v. *Holder*, *supra*, and 18 U.S.C. § 876 (mailing threatening communications), see, e.g., *United States* v. *Maisonet*, 484 F.2d 1356 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974).

The question whether the statements made by Kelner to WPIX were threats or mere political hyperbole was properly decided by the jury.* *Alexander* v. *United States*, 418 F.2d 1203, 1207 (D.C. Cir. 1969). There was more than sufficient evidence (including Kelner's own admissions) for the jury to find that Kelner's remarks were threatening and that he fully intended that they be interpreted seriously. Kelner's argument (Brief at 34) that his threat to murder Arafat should be constitutionally

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* Judge Owen charged the jury that:

> "I must caution you, however, that mere political hyperbole or expression of opinion or discussion does not constitute a threat.
>
> If you find that the statements, if made, by the defendant were no more than indignant or extreme method of stating political opposition to Arafat or the PLO, then you would be justified in finding that no threat was in fact made" (Tr. 410).

Furthermore, in both his opening statement and summation, the Government attorney consistently underscored the key issue before the jury as being whether Kelner's statements were simply the expression of a strongly held opinion on the one hand or the statement of a threat to kill which Kelner intended be taken seriously on the other hand (Tr. 10, 340-342, 356).

protected because "countless law-abiding citizens" think that Arafat should be murdered appeals to a lawlessness which, whatever Arafat's misdeeds, warrants the condemnation of our system of laws, not its protection.

Kelner also contends, based on the dissenting opinion of Judge Wright in *Watts* v. *United States*, 402 F.2d 676, 686 (D.C. Cir. 1968), *rev'd*, 394 U.S. 705 (1969), that as a matter of law, Kelner's statements did not amount to a threat because there was no intention to carry out the threat. Kelner's reliance on the dissenting opinion in *Watts*, *supra*, is misplaced.* Neither intent to carry out the threat nor present ability to do so are elements of the offense. *United States* v. *Holder*, *supra*, 302 F. Supp. at 300; see also *United States* v. *Compton*, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971); *United States* v. *Hall*, 493 F.2d 904, 905 (5th Cir. 1974); *United States* v. *Rogers*, 488 F.2d 512, 514 (5th Cir. 1974) rev'd on other grounds, 95 S.Ct. 2091 (1975); *United States* v. *Lincoln*, 462 F.2d 1368, 1369 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States* v. *Hart*, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972); *Roy* v. *United States*, 416 F.2d 874, 877-878 (9th Cir. 1969).

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* The Supreme Court in *Watts*, *supra*, did not decide whether it was a necessary element of a threat that the utterer have a present intention or ability to carry out that threat. *Id.* at 708.

POINT III

The cross-examination of Kelner's character witnesses was proper.

Kelner contends for the first time on appeal that the cross-examination of character witnesses on their knowledge of Kelner's arrests after the offense charged was improper. By failing to object in the Court below on the grounds now asserted on appeal Kelner has waived any such objection. *United States* v. *Indiviglio, supra.** However, even had the proper objections been made below, cross-examination was within the bounds of discretion of the District Court. By putting character witnesses on the stand, Kelner placed his character in issue. *Michelson* v. *United States, supra; United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

The four character witnesses called testified as to Kelner's reputation for peacefulness as well as for truth and veracity. The testimony elicited by Kelner concerned his *present* reputation for veracity and peacefulness, and the trial judge so understood it (Tr. 191, 203-204, 215, 221-222). As such, it is obvious that evidence post-dating the charge in question but pre-dating the witnesses' testimony was relevant in order to determine the witnesses familiarity with the defendant's reputation as well as a test of the witnesses' credibility.

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* Defense counsel objected below to questions on this subject on cross-examination on the sole ground that the Government was entitled to inquire only as to the character witnesses' knowledge of Kelner's prior convictions as opposed to his arrests (Tr. 194-195). During argument on post-trial motions (Tr. 445) and on appeal (Brief at 38), Kelner conceded that this claim was invalid under *Michelson* v. *United States*, 335 U.S. 469 (1948).

In *United States* v. *Lewis*, 482 F.2d 632 (D.C. Cir. 1973), the Court held that the trial judge erred in giving the prosecutor a prospective ruling granting him leave to cross-examine the defendant's *proposed* character witness on the basis of a post-incident arrest. In that case the Court held that the trial judge erred because he did not have sufficient facts on which he could properly exercise his discretion since he did not know what testimony the character witness would give. As the Court noted:

> "He did not know—if peace and good order were the testimonial topic—whether the reputation would be attested as of the offense date or as of some later time. These facets of the expected testimony bore heavily on the limits of permissible cross-examination." *Id.* at 643.

The Court indicated that if, as was the case here, testimony was elicited from character witnesses as to the defendant's *present* reputation for peacefulness, then cross-examination as to post-incident arrests would be within the Court's discretion.

> "While, as we have said, an issue over appellant's reputation for truth and veracity would not justify such an inquiry, an issue over his reputation for peace and good order possibly could. Thus the propriety of the cross-examination depended largely upon the particular approach which appellant's character presentation would take." *Id.* at 643.

In *Lewis*, *supra*, the Court noted that the scope of cross-examination of character witnesses is determined by the scope of direct examination subject to the trial judge's discretion.

> "Not every situation calls for exclusion of questions exploring knowledge of events occurring after the time in issue. Not every subsequent event is an unacceptable topic, nor a topic so prejudicial as to outweigh its probative significance; some events otherwise objectionable perhaps could be made unobjectionable. A decision to permit inquiry respecting subsequent events should, of course, be reached cautiously and only for the best of reasons. But in the final analysis the matter should be left to careful handling by the trial judge, subject to appellate correction only where mishandling is clear." *Id.* at 642.

Impeaching questions must be tested by comparison with the reputation asserted, *Michelson* v. *United States*, *supra*, at 483, 484.

Finally, even assuming any error in allowing cross-examination based on post-incident arrests to negate Kelner's reputation for peacefulness, it could only be harmless. As Judge Owen said ". . . in any event this character witness proof, quite frankly, I regard it as a very miniscule part of the case because this case really hinged on 55 seconds of a film clip" (Tr. 456).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT J. COSTELLO being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of October, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Nathan Lewin, Esq.
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W. Suite 500
Washington, D.C. 20037

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert J. Costello

ROBERT J. COSTELLO

Sworn to before me this

22 day of October, 1975

Maria A. Morales

MARIA A. MORALES
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Qualified in New York County
Term Expires March 30, 1976